No. 07-1453

In the Supreme Court of the United States

CHENG CHUI PING, AKA SISTER PING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's forfeited claim that the district court erred in instructing the jury on the "specified unlawful activity" element of the international promotional money laundering statute, 18 U.S.C. 1956(a)(2)(A), was not reversible plain error.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Johnson v. *United States*, 520 U.S. 461 (1997) 7, 8, 9, 11
Neder v. *United States*, 527 U.S. 1 (1999) 8
Stromberg v. *California*, 283 U.S. 359 (1931) 10
United States v. *Olano*, 507 U.S. 725 (1993) 8

Statutes:

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* 5
18 U.S.C. 1961(1) (Supp. V 2005) 5
18 U.S.C. 1961(1)(F) (Supp. V 2005) 6
18 U.S.C. 371 ..... 2, 3
18 U.S.C. 1202 ..... 2, 3
18 U.S.C. 1203(a) 3
18 U.S.C. 1956(a)(2)(A) 2, 3, 5
18 U.S.C. 1956(c)(7)(A) 5
18 U.S.C. 1960(a) 3
28 U.S.C. 2254(d) 11

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OPINION BELOW

The summary order of the court of appeals (Pet. App. 1a-7a) is unreported but is available at 2007 WL 4102736.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2007. A petition for rehearing was denied on February 11, 2008 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on May 12, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to engage in alien smuggling,

trafficking in ransom proceeds, hostage taking, and money laundering, in violation of 18 U.S.C. 371; money laundering, in violation of 18 U.S.C. 1956(a)(2)(A); and trafficking in ransom proceeds, in violation of 18 U.S.C. 1202. Pet. App. 3a. Petitioner was sentenced to aggregate terms of 420 months of imprisonment, to be followed by a three-year term of supervised release, and was fined $250,000. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1a-7a.

1. Petitioner was the leader of a large and profitable alien smuggling operation. Petitioner and her associates would recruit alien "customers" in China, obtain false travel documents for them, transport them to the United States along dangerous routes and in inhumane conditions, and then hold them hostage in the United States until their smuggling fees were paid. Gov't C.A. Br. 3-4.

The operation began in the early 1980s, when petitioner would smuggle villagers from China's Fujian Province into the United States in exchange for thousands of dollars. By the early 1990s, petitioner was smuggling thousands of illegal aliens into the United States, often hundreds at a time on cargo ships. Petitioner operated her business out of a small storefront in Chinatown in New York City. From there, petitioner also operated a money-transmitting business through which she laundered smuggling proceeds for herself and other alien smugglers and trafficked in ransom money. Petitioner had "employees" in China, Thailand, Hong Kong, Guatemala, Mexico, and Kenya, among other countries. Petitioner also enlisted the help of the Fuk Ching Gang, a violent criminal enterprise responsible for murders, robberies, and other crimes. Gang members offloaded aliens from arriving cargo ships. On one occasion in 1993, the gang members failed to meet a cargo ship (the *Gol-*

den Venture) on which petitioner and other alien smugglers had transported a group of aliens to New York. At the smugglers' instruction, the captain ran the ship aground and instructed the passengers to wade or swim to shore. Dozens of aliens did so, and ten of them drowned. On another occasion in approximately 1998, 14 aliens being smuggled by petitioner drowned off the coast of Guatemala. Gov't C.A. Br. 4-12.

2. On June 6, 2000, a federal grand jury in the Southern District of New York filed a seven-count superseding indictment charging petitioner with conspiracy to engage in alien smuggling, trafficking in ransom proceeds, hostage taking, and money laundering, in violation of 18 U.S.C. 371; two counts of hostage taking, in violation of 18 U.S.C. 1203(a); two counts of money laundering, in violation of 18 U.S.C. 1956(a)(2)(A); operating an illegal money transmitting business, in violation of 18 U.S.C. 1960(a); and trafficking in ransom proceeds, in violation of 18 U.S.C. 1202. Petitioner was extradited from Hong Kong on five of those counts (excluding one count of hostage taking and the single count of operating an illegal money transmitting business, which were not submitted to the Hong Kong magistrate for consideration). Gov't C.A. Br. 1-2.

a. Count 3 of the indictment charged petitioner with money laundering in connection with petitioner's transmittal of $30,000 from the United States to Thailand in March 1991 on behalf of Weng Yu Hui (Weng). Gov't C.A. Br. 17.[1] The indictment alleged that petitioner transmitted the funds "with the intent to promote the carrying on of specified unlawful activity, to wit, the

[1] The 1991 money laundering count was originally Count 4 in the superseding indictment. It was subsequently renumbered as Count 3. Gov't C.A. Br. 2.

smuggling by airplane of four aliens from the PRC to New York where they would be held hostage until money was paid." Gov't C.A. App. A37-A38.

b. The evidence at trial in support of Count 3 established that in 1984, Weng had hired petitioner to smuggle him to the United States from China for an $18,000 fee. Petitioner held Weng hostage, first in Guatemala and then in New York, until Weng's and his brother-in-law's smuggling fees were paid or guaranteed. Weng and petitioner then became friends. Gov't C.A. Br. 5-6.

In 1991, Weng decided to enter the alien smuggling business. His first operation involved smuggling four individuals from Thailand into the United States. To finance the operation, Weng's associates in Thailand needed $30,000. Weng brought $30,000 in cash to petitioner's store. Weng gave the cash, passport numbers, and a cell phone contact number to petitioner and told petitioner that the money was needed in Thailand in a few days. After Weng handed petitioner the cash, petitioner remarked, "[N]ow you're my competitor." Weng successfully smuggled the four individuals into the United States. Weng brought them to petitioner's restaurant, pointed them out to petitioner, and remarked that his operation had been successful. Petitioner had no comment. Gov't C.A. Br. 5-7, 34 (quoting 5/16/05 Tr. 121-122).

c. In instructing the jury on Count 3, the district court read the narrative description of the specified unlawful activity that was contained in the indictment. The court then instructed the jury that, in order to convict petitioner of the charge, it was required to find, among other things, that "the defendant acted with the intent to promote the carrying on of specified unlawful activity,

namely the acts of alien smuggling or hostage taking *specified in [Count 3]*." Gov't C.A. Br. 19-20. The court also instructed the jury that it was required to be unanimous as to which specified unlawful activity (*i.e.*, alien smuggling or hostage taking) it found. *Id.* at 20. The district court did not further define "alien smuggling" in that instruction. In connection with the conspiracy charge, however, the court informed the jury that alien smuggling has three elements: (1) the defendant "brought an alien to the United States, in any manner whatsoever, and did so at a place that was not a designated port of entry;" (2) "the defendant knew that the person brought to the United States was an alien;" and (3) "the defendant acted wil[l]fully." *Ibid.*

3. On appeal, petitioner contended, *inter alia*, that the district court constructively amended the indictment by failing to instruct the jury that, in order to constitute a "specified unlawful activity" for purposes of the money laundering statute, alien smuggling must be "committed for the purpose of financial gain." Pet. C.A. Br. 27 (quoting 18 U.S.C. 1961(1) (Supp. V 2005)). The court of appeals affirmed. Pet. App. 1a-7a.

a. The international money laundering statute, 18 U.S.C. 1956(a)(2)(A), makes it a crime to "transport[], transmit[], or transfer[] * * * a monetary instrument or funds from a place in the United States to or through a place outside the United States * * * with the intent to promote the carrying on of specified unlawful activity." Section 1956(c)(7)(A) defines the term "specified unlawful activity" to include, *inter alia*, "any act or activity constituting an offense listed in" 18 U.S.C. 1961(1) (Supp. V 2005), which is the definition of "racketeering activity" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961

et seq. RICO defines "racketeering activity" to include any act indictable under certain provisions of the Immigration and Nationality Act (including alien smuggling) if the act "was committed for the purpose of financial gain." 18 U.S.C. 1961(1)(F) (Supp. V 2005).

b. The court of appeals observed that petitioner had failed to object at trial to the district court's omission of the "financial gain" component of alien smuggling as a specified unlawful activity. Pet. App. 3a-4a. The court first rejected petitioner's claim that the omission from the jury charge resulted in a constructive amendment of the indictment. *Id.* at 4a. The court noted that the district court had instructed the jury that in order to convict petitioner of money laundering, it was required to find that the evidence proved the particular specified unlawful activity that was charged in the text of the money laundering count. *Ibid.* The court held that, although the indictment did not allege the "purpose of financial gain" requirement "in so many words," that requirement "was consistent with, and implied by" the allegation in the indictment that the four aliens being smuggled would be held hostage until money was paid. 2007 WL 4102736, at *1.[2] The court then rejected petitioner's constructive amendment claim because the court "discern[ed] no risk that [petitioner] was either convicted of an offense that was not charged in the indictment or that she lacked sufficient notice to prepare for trial." Pet. App. 4a.

In the alternative, the court construed petitioner's claim of error as a challenge to the jury instruction. Pet. App. 5a. Because petitioner failed to object to the

[2] The reproduction of the court of appeals' opinion in petitioner's appendix (at 4a) omits some of the text. We therefore cite to this portion of the opinion as it appears in Westlaw.

money laundering instruction on the ground that she asserted on appeal, the court concluded that the plain-error standard of review applied. *Ibid.* The court observed that "overwhelming evidence" established that petitioner knew that the alien smuggling activities at issue "were engaged in for purposes of profit" and held that "any error in the charge was not only not plain, it was harmless." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 16-23) that the court of appeals erred in its application of the plain-error standard to petitioner's forfeited claim of instructional error. Petitioner asserts (Pet. 18) that the instructional error in this case "create[d] an alternative, unconstitutional theory" of conviction on the money laundering count that requires reversal. Petitioner also contends (Pet. 18) that there is a conflict among the courts of appeals on "the standard of review to be used where an omission or misdescription of an element of the offense permits a conviction on an alternative invalid theory." Further review is unwarranted. The court of appeals did not err, and the arguments for further review that petitioner raises in this Court were neither raised in nor addressed by the court below. It is therefore not necessary to hold this case for *Hedgpeth* v. *Pulido*, cert. granted, No. 07-544 (oral argument scheduled for Oct. 15, 2008).

1. Petitioner concedes (Pet. 13, 19-23) that she did not object at trial to the omission of the "financial gain" requirement from the jury instruction on money laundering premised on the specified unlawful activity of alien smuggling and that the plain-error standard applies. In *Johnson* v. *United States*, 520 U.S. 461, 466-470 (1997), this Court applied the plain-error analysis of

United States v. *Olano*, 507 U.S. 725 (1993), to a forfeited claim that the district court erroneously failed to submit the materiality element of perjury to the jury. The Court upheld the perjury conviction, finding that the evidence of materiality was "overwhelming" and the error therefore did "not meet the final requirement of *Olano*," *i.e.*, that the forfeited error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." 520 U.S. at 469-470 (citation omitted). The Court did not decide whether the failure to submit an offense element to the jury is "structural" error in the sense that it necessarily affects substantial rights and, if the claim is preserved, requires automatic reversal. *Id.* at 468-469. In *Neder* v. *United States*, 527 U.S. 1, 8-15 (1999), the Court decided the issue left open in *Johnson* and held that the omission of an offense element from a jury instruction is subject to harmless-error review. The Court held that the error at issue in *Neder*—the omission of the materiality element from the jury instruction on the offense of tax fraud—was harmless beyond a reasonable doubt because the evidence of materiality was "uncontested and supported by overwhelming evidence." *Id.* at 17.

The court of appeals correctly applied the plain-error standard of *Olano* to petitioner's forfeited claim and did not err by upholding petitioner's money laundering conviction under that standard. Although it was error to exclude the "for financial gain" requirement from the jury instruction, it is not clear or obvious that the district court's instructions failed to apprise the jury of that requirement nonetheless. Count 3 charged petitioner with transferring money to Thailand with the intent to promote the smuggling of aliens from China to New York "where [the aliens] would be held hostage

until money was paid." Gov't C.A. App. A37-A38. The district court read this description of the charged specified unlawful activity to the jury. *Id.* at A718. And the court instructed the jury that, in order to convict petitioner, it was required to find "the acts of alien smuggling or hostage taking specified in" the indictment. *Id.* at A719. As the court of appeals observed in rejecting petitioner's constructive amendment claim, the jury instructions, viewed as a whole, required the jury to find that Weng's alien smuggling venture involved the payment of money and thus was "for financial gain."

Moreover, as the court of appeals held, petitioner cannot carry her burden under the plain-error standard of demonstrating that the instructional omission affected her substantial rights or "seriously affect[ed] the fairness, integrity or public reputation" of her trial. *Johnson*, 520 U.S. at 469-470 (citation omitted). The court correctly found (Pet. App. 5a), in a fact-bound ruling that does not warrant this Court's review, that the evidence that petitioner "knew [Weng's] smuggling activities were engaged in for purposes of profit" was "overwhelming."

While petitioner's current theory (Pet. 22) is that the jury might have concluded that petitioner believed Weng was smuggling his own relatives, the evidence showed that the smuggling mission involving the four aliens was the beginning of Weng's ongoing business enterprise with petitioner, which later resulted in both of their "customers" being stranded off the coast of New York on the *Golden Venture*. Gov't C.A. Br. 8-11. Petitioner's knowledge of the "financial gain" motive of Weng's smuggling activities is best demonstrated by her response to receiving Weng's $30,000 for transmittal to Thailand: she stated that Weng was "now [her] competi-

tor." *Id.* at 6 (quoting 5/16/05 Tr. 121-122). As the court of appeals observed, the trial record is "replete with evidence that these smuggling rings were operated as commercial enterprises" and that petitioner knew of that fact. Pet. App. 6a. Indeed, petitioner's defense to the money laundering charge at trial was not that Weng's alien smuggling venture was not for financial gain, but that she lacked knowledge that Weng was smuggling aliens at all. Gov't C.A. Br. 33. The court of appeals did not err in finding that the evidence of petitioner's knowledge of Weng's profit motive was uncontested and overwhelming and that the district court's omission of the "for financial gain" requirement from the jury instruction was therefore not reversible plain error.

2. Relying on this Court's decision in *Stromberg* v. *California*, 283 U.S. 359 (1931), petitioner contends (Pet. 18-21) that the district court's jury instruction "created an alternative improper theory of conviction" that requires reversal because it is "impossible to ascertain whether [petitioner] has been punished for non-criminal conduct." Petitioner further contends (Pet. 18-19) that there is a conflict among the courts of appeals concerning the standard of review that applies "where an omission or misdescription of an element of the offense permits a conviction on an alternative invalid theory."

In *Hedgpeth* v. *Pulido*, cert. granted, No. 07-544 (oral argument scheduled for Oct. 15, 2008), the question presented is whether the Ninth Circuit erred in granting habeas relief on the ground that the submission of two alternative theories of guilt to the jury, one of which was legally erroneous, constituted structural error. Although petitioner's arguments for further review impli-

cate the underlying legal issue presented in *Hedgpeth*, this case need not be held pending the outcome of that case. First, this case arises in the federal plain-error context because petitioner did not raise her current claim in the district court. *Hedgpeth* arises in federal habeas review under 28 U.S.C. 2254(d), and the resolution of that issue raises distinct questions from application of federal plain-error standards. For example, as *Johnson* establishes, when the plain-error standard applies, the characterization of an error as "structural" does not warrant relief unless the final requirement of *Olano* also is satisfied. *Johnson*, 520 U.S. at 468-470. Second, petitioner did not cite *Stromberg* in the court of appeals, nor did she argue (Pet. 18) that the district court's jury instruction created "an alternative, unconstitutional theory," which therefore was "qualitatively different from erroneous instructions which merely omit or misdescribe an element." Because the question on which petitioner seeks the Court's review was not presented to or decided by the court of appeals, it is not properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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